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DOI
10.1080/20508840.2022.2033942

Publication date
2022

Document Version
Final published version

Published in
The Theory and Practice of Legislation

THE THEORY AND PRACTICE OF LEGISLATION
2022, VOL. 10, NO. 1, 22–47
https://doi.org/10.1080/20508840.2022.2033942

Routledge
Taylor & Francis Group

Persuasive rather than 'binding' EU soft law? An argumentative perspective on the European Commission's soft law instruments in times of crisis

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ABSTRACT

This paper starts from the premise that argumentation in EU (Commission) soft law instruments is essential for their effectiveness, mainly due to its function to persuade addressees as a means to enhance compliance. Notwithstanding their importance in the EU legal-political landscape, the problem is how to ensure that these instruments devoid of formal legally binding force can function as effective governance tools by convincing addressees to comply, particularly during crisis periods such as the Covid-19 crisis, when fast and effective action is urgently needed. By pointing at a number of significant legal problems and concerns deriving from the Commission's 'hardened' soft law instruments, we suggest a normative approach focusing on the potential of EU soft law instruments to act as highly persuasive tools. By making the instruments' argumentation a core concern, we examine its role as a means to improve the intrinsic quality of EU (Commission) soft law and to foster effective compliance. To this end, we propose a theoretical-analytical framework combining insights from law and argumentation theory, that puts forward an argumentative toolbox for the analysis and assessment of EU (Commission) soft law instruments. This toolbox comprises four argumentative parameters that need to be taken into account in the drafting and evaluation of EU (Commission) soft law instruments: (1) the *content* of the argumentation, (2) the *design* of the arguments pointing at persuasive suggestions for cooperation, (3) the factors influencing *argumentative effectiveness*, and (4) the *soundness* of argumentation.

KEYWORDS EU soft law instruments; European Commission; argumentation; persuasion; compliance

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1. Introduction

European Union (EU) governance has regularly been relying on soft law instruments,[1] with utmost intensity in times of crisis.[2] Illustrative of this trend, since 2020 after the outbreak of the COVID-19 pandemic, the European Commission in particular has been enacting recommendations, communications, guidelines at a remarkable speed.[3] The Commission seems to have felt obliged to respond quickly to the COVID-19 crisis entailing trans-boundary effects and hence in need of effective EU level coordinated action.[4]

Though praised for their flexibility, adaptability and 'rapid reaction' capacity, EU (Commission) soft law instruments are controversial, as they might arguably entail far-reaching consequences due to their contentious 'hardening,' i.e. the capacity to produce (not negligible) legal and practical effects, despite their legally non-binding nature enshrined in Article 288 of the Treaty on the Functioning of the European Union (TFEU).[5] Without denying the virtues of soft law to ensure flexibility in the Commission's policy-making and to enhance effectiveness of EU law and policy, our working hypothesis in this article is that the Commission's crisis soft law instruments, more specifically those enacted during and in response to the current COVID-19 pandemic, suffer from drawbacks at least comparable to, if not more serious than those adopted by the EU (Commission) under normal circumstances.

Against this background we propose to go back to basics by falling back on the formal delineation made in EU law between legally binding ('hard law' in political science terms) and legally non-binding, though potentially highly effective in practice, acts (corresponding roughly to 'soft law' in political science terms) as a way to alleviate some of the many intricacies created

[1]Oana Stefan, *Soft Law in Court. Competition Law, State Aid and the Court of Justice of the European Union* (Wolters Kluwer 2013), 12.

[2]Oana Stefan, 'The future of European Union soft law: A research and policy agenda for the aftermath of COVID-19' (2020a) *Journal of International and Comparative Law 7*(2) 329-349; Oana Stefan, 'COVID-19 soft law: voluminous, effective, legitimate? A research agenda' (2020b) *European Papers 5*(1) 663-670.

[3]See European Commission, Corona virus response, < https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response_en > (accessed 5 January 2022). According to a rough estimation made by Stefan, almost 400 COVID-related documents had been enacted by the EU in virtually all its policy area since the beginning of the pandemic until June 2020 only, more than 60% of these being categorized as 'soft law', see Stefan 2020a (n 2) 332-333.

[4]Alessio Pacces and Maria Weimer, 'From diversity to coordination: A European approach to COVID-19' (2020) *European Journal of Risk Regulation 11*(2) 283-296.

[5]See for a more detailed analysis against the background of the legal nature of Commission recommendations examined in the seminal Case C 16/16P *Belgium v Commission*, Florin Coman-Kund and Corina Andone, 'European Commission's Soft Law Instruments: In between Legally Binding and Non-binding Norms' in Patricia Popelier, Helen Xantaki, William Robinson, Joào Tiago Silveira and Felix Uhlmann (eds.), *Lawmaking in Multi-level Settings* (Oxford: Hart-Nomos Publishing 2019) 183-195.

by the 'murky' EU soft law.[6] As an alternative, we suggest that the specific nature of COVID-19-related EU (Commission's) soft law instruments as formally non-binding legal acts[7] makes it all the more important to examine them not only from a legal point of view, but also (and perhaps foremost) from an argumentative perspective with a view to assess their quality and effectiveness as persuasive regulatory tools.[8]

The following question, exceeding the boundaries of legal scholarship, is addressed in this article: How can it be ensured that EU (Commission) soft law instruments devoid of formal legal binding force can be effective by convincing addressees to comply, particularly during crisis periods when fast and vigorous action is urgently needed? It is the major challenge of this article to break new grounds by re-conceptualizing EU (Commission) soft law instruments as argumentative instruments with a view to improve their quality and increase their effectiveness as governance tools. We rely on a normative approach that combines law, for the purpose of situating EU (Commission) soft law within the EU legal framework and for examining its legal nature, limits and effects, with argumentation theory, for the purpose of distilling an analytical framework comprising specific argumentative parameters against which EU (Commission) soft law instruments can be assessed, and based on which suggestions for improving their intrinsic quality as persuasive tools can be made. While COVID-19-related soft law instruments have been adopted by various EU institutions and bodies (e.g. the Council, the European Parliament and various EU agencies), the focus in this article lies on the Commission because of its prominent role in coordinating the EU-level COVID-19 response resulting in the adoption of an impressive number of soft law instruments (many of them featuring the problematic 'hardening' pattern discussed here). However, we believe that the proposed theoretical-analytical framework and the issues highlighted in this article have broader resonance, beyond the category of Commission's soft law instruments, being potentially applicable to EU soft law instruments

[6]See Coman-Kund and Andone (n 5) 175-178. There is no full correspondence between the legal categories 'legally binding/non-binding acts' and the political science categories 'soft/hard law,' as they rely on different normative grounds; while the legal categories reflect a binary logic according to which an instrument is either legally binding or non-binding, the political science terms are conceptually less delineated, being founded on the idea of a continuum between soft law and hard law, whereby various instruments feature different degrees of bindingness/non-bindingness (see Fabien Terpan, 'Soft law in the European Union – The changing nature of EU law' (2015) *European Law Journal 21* 68-96). In this paper, the term 'EU (Commission) soft law' refers to legally non-binding, but in practice potentially effective instruments.

[7]As pointed out by Advocate General Bobek, the dichotomy between legally binding and non-binding acts entails that in principle soft law cannot be binding, at least not 'in the traditional sense.' See Opinion of Advocate General Bobek in Case C-16/16P *Belgium v Commission* EU:C:2017:959 paras. 86 and 112.

[8]This approach seems to find support in CJEU's recent jurisprudence on Commission's recommendations (see Case C 16/16P *Belgium v Commission* ECLI:EU:C:2018:79).

in general – which is the reason why we often use the formula EU (Commission) soft law throughout this paper.

After first discussing the blurred legal nature of EU soft law in times of crisis (section 2), we suggest to keep soft law instruments for what they are, namely legally non-binding but potentially highly persuasive tools (section 3). We argue thereafter that an 'explain and convince' approach is to be preferred to the legal and practical ambiguity created by 'hardened' EU (Commission) soft law instruments (section 4). Next, we highlight the benefits of argumentation theory for the study of EU soft law instruments (section 5), and finally we introduce an argumentative toolbox that defines concrete parameters for assessing and improving their intrinsic quality (section 6).

2. Problematic EU soft law in times of crisis

Soft law instruments, in particular those enacted during crisis, are deemed particularly suitable to deal with the complexity and diversity of European affairs in a rapidly changing situation. They are easy to enact, as they do not entail the intricacies of the EU formal decision-making process, which makes the whole adoption procedure much simpler and faster, [9] and in principle they are not subject to the demanding legal protection and scrutiny standards imposed on Union's legally binding acts.[10] Moreover, they are considered to be flexible, in that they leave arguably a great degree of

[9]Slominski and Trauner point out that 'the low legislative costs of soft law are considered particularly relevant in a situation of crisis or emergency when policy-makers are expected to act quickly and effectively' (Peter Slominski and Florian Trauner, 'Reforming me softly – how soft law has changed EU return policy since the migration crisis' (2020) *West European Politics 44*(1) 96).

[10]For instance, Article 263 (TFEU) enables the Court of Justice of the European Union (CJEU), under the annulment procedure, to review the legality and ultimately declare void various acts of the EU institutions intended to produce legal effects, including 'acts of the Council, of the Commission and of the European Central Bank, *other than recommendations and opinions*' [emphasis added]; in a similar vein, Article 265 TFEU ('failure to act' procedure) – the 'mirror' of the annulment procedure enshrined in Article 263 TFEU – allows natural and legal persons to file a complaint before the CJEU on the ground that 'an institution, body, office or agency of the Union has failed to address to that person any act *other than a recommendation or an opinion*' [emphasis added]. This leaves EU soft law acts judicially reviewable mainly under the preliminary ruling procedure in Article 267 TFEU, see Case C-322/88 *Grimaldi v Fonds des maladies professionnelles* EU:C:1989:646 paras. 8–9 and, most recently, Case C 911/19 *Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR)* ECLI:EU:C:2021:599 paras. 56–57 and Case C-501/18 *BT v Balgarska Narodna Banka* ECLI:EU:C:2021:249 para. 82 (quite remarkably, in the latter case, the contested recommendation of the European Banking Authority was declared invalid by the Court); the only exception admittedly accepted by the CJEU, where EU soft law instruments could be reviewed under Article 263 TFEU, is when the Court would establish, based on its long-standing 'substance prevails over form' test originating in the landmark *ERTA* judgment (Case 22/70 *Commission v Council* ECLI:EU:C:1971:32, para. 42), that the soft law instrument actually disguises genuine binding effects, entailing that, in spite of the label, it amounts in fact to a legally binding act, see Case C 16/16P (n 8) paras. 29-32, and some concrete examples in Case C-303/90 *France v Commission* ECLI:EU:C:1991:424 (annulment of a code of conduct adopted by the Commission) and in Case C-325/91 *France v Commission* ECLI:EU:C:1993:245 (annulment of a Commission communication).

leeway to the Member States, and are easily adapted to changing circumstances, going in the case of the Commission, as far as issuing new such instruments every week during the COVID-19 crisis.[11] In justifying this approach, the Commission routinely argues that the measures adopted by the Member States lead to fragmentation and, therefore, are not efficient, which in turn requires EU level coordination and effective collective action to solve COVID-19-related problems that no Member State can solve on its own.[12]

Notwithstanding the advantages of soft law as part and parcel of Union's 'new modes of governance' arsenal,[13] these instruments also spur tensions and controversy because of their contentious capacity to produce legal and practical effects despite their legally non-binding nature enshrined in Article 288 TFEU.[14]

Apart from the obvious legitimacy issues bringing 'to the fore a lack of involvement from stakeholders and democratic bodies,'[15] Commission's soft law instruments (especially those enacted during and in response to the current COVID-19 pandemic) remain subject to contestation as they may, for instance, disguise arguably genuine binding measures and far-reaching legal effects due to their questionable 'hardening.'[16] Thus, both the wording and the substance of their provisions, as well as the legal-policy framework to which these instruments belong suggest that they could be more than merely non-binding (at least from the addressee's perspective). The prescriptive content of the Commission's soft law instruments featuring imperative and mandatory formulations and detailed provisions, alongside the existence and design of implementing/enforcement tools (e.g. precise deadlines to take action, reporting/information requirements by addressees) indicate the intention of the author of the act (in this case the European Commission) to induce or compel full compliance by the Member

[11] See European Commission, 'Coronavirus response' (n 3).

[12] See Commission Recommendation (EU) 2020/518 of 8 April 2020 on a common Union toolbox for the use of technology and data to combat and exit from the COVID-19 crisis, in particular concerning mobile applications and the use of anonymised mobility data [2020] OJ L 114/7, recital (22) of the Preamble.

[13] See Sabine Saurugger and Fabian Terpan, 'Resisting EU Norms. A Framework for Analysis' (2013) *Sciences Po Grenoble Working Paper 2*: 1-25, 4.

[14] See Coman-Kund and Andone (n 5) 183–193 and Opinion of Advocate General Bobek in Case C-16/16P (n 7)

[15] See Stefan 2020a (n 2) 331.

[16] See on the meaning and implications of the 'hardening' of EU soft law Coman-Kund and Andone (n 5) 175-195; Markéta Whelanová, 'A Critical Analysis of EU Regulation' in Patricia Popelier, Helen Xantaki, William Robinson, Joào Tiago Silveira and Felix Uhlmann (eds.), *Lawmaking in Multi-level Settings* (Oxford: Hart-Nomos Publishing 2019) 123-150; Petra Lea Láncos, 'The Phenomenon of 'Directive-like Recommendations' and Their Implementation: Lessons from Hungarian Legislative Practice' in Patricia Popelier, Helen Xantaki, William Robinson, Joào Tiago Silveira and Felix Uhlmann (eds.) (eds.), *Lawmaking in Multi-level Settings* (Oxford: Hart-Nomos Publishing 2019) 199-218; see also Opinion of Advocate General Bobek in Case C-16/16P (n 7).

States.[17] What is more, the overall legal-policy context within which the Commission's soft law instruments are adopted and implemented might trigger their legal 'hardening' both at EU level and within the Member States[18] due to the application of EU legal principles (i.e. sincere cooperation, legitimate expectations, legal certainty)[19] or due to their intricate relationship with legally binding acts.[20]

The blurred legal nature of EU (Commission) soft law instruments, due to their symptomatic 'hardening,' raises a number of important legal problems and questions.[21] These instruments arguably display a discrepancy between their formal non-binding status and their actual intended meaning and effects.[22] This is likely to affect legal certainty[23] and raise

[17]Some prominent examples enacted during the COVID-19 crisis include Commission Recommendation (EU) 2020/2243 of 22 December 2020 on a coordinated approach to travel and transport in response to the SARS-COV-2 variant observed in the United Kingdom, C/2020/9607 final, [2020] OJ L436/72; Commission, 'Short-term EU health preparedness for COVID-19 outbreaks' (Communication) COM (2020) 318 final; Commission, 'Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak' (Communication) C/2020/2051[2020] OJ C102I/12; Commission, 'European Commission Guidelines: Facilitating Air Cargo Operations during COVID-19 outbreak' (Communication) C (2020) 2010 final, 26 March 2020.

[18]Relying on the 'Grimaldi' (n 10) line of jurisprudence, Stefan notes that '(…) *with some exceptions* (emphasis added), soft law cannot be legally binding (…)' for and within the Member States '(…) with the EU Courts requiring it to be taken into consideration', Stefan 2020a (n 2) 342. Yet 'taking into consideration' can sometimes be interpreted very close to an outright duty to comply with the instrument, such as in the very recent CJEU judgments in Joined Cases C–83/19, C–127/19, C–195/19, C–291/19, C–355/19 and C–397/19, *Asociația 'Forumul Judecătorilor din România'* ECLI:EU:C:2021:393 and in Joined Cases C-357/19 *Euro Box Promotion and Others*, C-379/19 *DNA- Serviciul Teritorial Oradea*, C-547/19 *Asociația « Forumul Judecătorilor din România »*, C-811/19 *FQ e.a.*, C-840/19 *NC* (nyr); here the Court ascertains that the binding 'benchmarks' enshrined in Commission Decision 2006/929 establishing a mechanism for cooperation and verification of progress in Romania post-accession entail that 'Romania is required to take the appropriate measures for the purposes of meeting those benchmarks, *taking due account, under the principle of sincere cooperation laid down in Article 4(3) TEU*, of the reports drawn up by the Commission on the basis of that decision, *and in particular the recommendations made in those reports* (emphasis added)' (*Asociația 'Forumul Judecătorilor din România'* para. 178 and *Euro Box Promotion* para. 175).

[19]See Stefan 2020a (n 2) 342-345.

[20]E.g. non-binding guidelines enacted for the purpose of interpretation/application of EU legally binding acts, EU legally binding acts referring to/incorporating standards laid down in soft law instruments, the use of the 'EU conditionality' technique whereby granting certain benefits or legal effects are made dependent upon compliance by Member States with various soft law instruments (e.g. the Commission's recommendations addressed to Romania and Bulgaria within the Cooperation and Verification Mechanism (CVM) during the post-accession period), or the 'hardening' of EU soft law instruments via application/incorporation within Member States through national legally binding acts; in the latter case, Advocate General Bobek argues that what would qualify as 'soft law' when looking exclusively at EU level might become 'something very different one level down within the Member States' to the extent that '"soft law' is 'no longer so soft', or may even turn into proper 'hard law,'" Advocate General Bobek Opinion in Case C 911/19 (n 10), para. 95.

[21]Coman-Kund and Andone (n 5); see also Láncos (n 16) and Opinion of Advocate General Bobek in Case C-16/16P (n 7).

[22]One of the core legal questions in this context is whether EU institutions are competent to enact a legal instrument that turns out to be more or something different than what its apparent from its (non-binding) label and legal form, see, for instance, Case C-303/90 (n 10) para. 27.

[23]In the past, the Court annulled a Commission communication which turned to be a genuine 'act intended to have legal effects of its own' for infringing the principle of legal certainty, Case C-325/91 (n 10) para. 30.

issues of institutional balance[24] as well as, probably more than ever, issues related to the limits and exercise of EU competence.[25] It is by now clear that the proliferation of EU soft law instruments, especially at such speed and with such important consequences for the Member States, may affect legal certainty and review, with national administrations and courts being unsure whether, let alone how, to apply them.[26] This may ultimately undermine the very effectiveness, legality and legitimacy of EU action. In other words, EU (Commission's) soft law instruments enacted during crisis (including during the COVID-19 crisis), despite their common usage, remain an unclear and contested category. They bear the promise of a more nuanced, flexible and 'closer to reality' tool of current law-making and regulatory governance, but at the same time they run the risk of creating additional legitimacy problems, as well as legal complications and ambiguity.[27]

However, EU soft law instruments during crisis remain vital as voluntary instruments, prompting quick responses to emergency situations. This is particularly the case of the COVID-19 pandemic[28] not only because of the need for prompt EU action outside the constraints of slower formal decision-making procedures, but also in view of the reduced EU competences in the area of public health.[29] Thus, except for common safety concerns in public health matters for the aspects defined in the Treaty[30] that

[24]Relying on soft law rather than on established formal procedures for legally binding instruments may obviously obfuscate the distribution of powers between the EU institutions, in particular when soft law is used by the Commission instead of a formal decision-making process involving (also) other actors, for instance the Council and/or the European Parliament – see also Slominski and Trauner (n 9).

[25]The recourse to 'hardened' soft law instruments by the Commission in policy areas where the EU has rather 'light' competences according to the Founding Treaties is problematic and could possibly amount to a *de facto* extension 'by stealth' of Union's competences - see also Opinion of Advocate General Bobek in Case C-16/16P (n 7) para. 156.

[26]Coman-Kund and Andone (n 5); see Opinion of Advocate General Bobek in Case C-16/16P (n 7), Opinion of Advocate General Bobek in Case C-379/19, *DNA-Serviciul Teritorial Oradea v KI, LJ, IG, JH* ECLI:EU:C:2021:174; see also CJEU judgments in Case C-501/18 (n 10), in *Asociația 'Forumul Judecătorilor din România'* (n 18) and *Euro Box Promotion* (n 18).

[27]According to Stefan, soft law is likely to 'undermine the very principles it is meant to foster, as it suffers from important legitimacy deficits, it is hardly justiciable, and its legal effects are blurred,' Stefan 2020a (n 2) 330.

[28]Based on the estimation made by Stefan, approximately 14% of the EU soft law instruments enacted between the start of the COVID 19 crisis and June 2020 pertain to the field of public health, see Stefan 2020a (n 2).

[29]Some scholars argued recently for more creative interpretation and uses of EU competences in the context of the COVID-19 crisis - for instance by relying on the use of stronger EU 'internal market' competences (see Pacces and Weimer (n 4) 283, 292) or, even more daringly, by putting forward a 'web of EU competence' approach that would enable the EU to claim more extensive powers on public health issues (see Kai Purnhagen, Aniek de Ruijter, Mark Flear, Tamara Hervey and Alexia Herwig, 'More Competences than You Knew? The Web of Health Competence for European Union Action in Response to the COVID-19 Outbreak' (2020) *European Journal of Risk Regulation 11* 297–306); while EU competences in public health could be reinforced to some extent via other legal bases, such as the ones pertaining to the internal market like Article 114 TFEU, in our view there are boundaries to creative and purposive interpretation of the Treaties in that they cannot overcome the inherent limits on EU competences flowing from Articles 6 (a) TEU and 168 TFEU.

[30]These matters are primarily listed under Article 168 (4) TFEU.

are included in the field of shared competences,[31] public health remains an area in which the EU retains only light supporting competences.[32] While Article 168 (1) TFEU proclaims that 'a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities,' it also stresses that EU action 'shall complement' Member States' actions. Moreover, Article 168 (7) TFEU guarantees that EU actions must respect 'the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care.' What remains for the EU consists mainly of *incentive* measures to protect and improve human health, but 'excluding any harmonisation of the laws and regulations of the Member States,'[33] and the possibility of the Council to adopt recommendations on a Commission's proposal.[34] Regarding specifically Article 168 (5) TFEU, the most obvious legal basis for EU action against COVID-19, in view of its focus on combating 'major cross-border health scourges' and 'serious cross-border threats to health,' the relevant incentive measures are not adopted by the Commission, but by the European Parliament and the Council according to the ordinary legislative procedure. Yet and particularly relevant for the purpose of this paper, Article 168 (2) TFEU entrusts the Commission with the task to support the coordination of Member States' actions in the field of public health. The Commission is expected to promote Member State cooperation through various initiatives (including soft law instruments) pertaining to 'the establishment of guidelines and indicators, the organisation of exchange practices, and the preparation of the necessary elements for periodic monitoring and evaluation.' The Commission is thus given a mere supportive/coordination role of Member States' voluntary cooperation and actions, which seems to exclude the possibility to adopt legally binding instruments.

It is against this legal background that the COVID-19-related actions and instruments adopted by the Commission need to be understood. In this context, the Commission attempts to reduce the inevitable tension between the need for quick regulatory action to deal with COVID-19 and the very limited possibilities to constrain Member States' actions flowing from the light EU competences in public health matters. The Commission is confronted with a dilemma which is arguably solved in the current institutional framework by soft law instruments; on the one hand, the need for coordination and regulatory action to address the EU-wide repercussions of the COVID-19 pandemic; on the other hand, the wide room for voluntary action by the Member States in public health matters. Yet the attempt to solve this conundrum via speedily adopted soft law instruments featuring

[31] Article 4(2)k TFEU.
[32] Article 6 (a) TFEU.
[33] Article 168 (5) TFEU.
[34] Article 168 (6) TFEU.

highly prescriptive provisions and potentially wide-reaching effects only amplifies the legitimacy and legality problems surrounding these governance tools. One way out from this conundrum is to reconsider EU (Commission) soft law in light of the relevant EU legal framework, as well as of the core rationale and functions of these instruments.

3. Back to basics: legally non-binding (but persuasive) soft law

We propose to move away from the irreducible discussions concerning the legitimacy, nature and effects of legally ambiguous EU soft law,[35] prompting recurrent calls to clarify its legal effects and enhance its legitimacy, effectiveness and accountability.[36] Starting from the observation that 'emergency EU soft law suffers from the same problems as any instrument of soft law,'[37] we suggest that soft law instruments require more than just concern for the legal aspects pointed out so often by scholars and practitioners alike.[38] We need to go beyond the analysis of their 'murky' legal nature and effects, which undoubtedly remains problematic, and to genuinely inquire into the very rationale, aims, functions and legal limits of these instruments with a view to alleviate legitimacy issues, legal problems and ambiguity surrounding their status, while amplifying the effectiveness and potential added value of these tools.

One way to progress in this area would be to go back to basics by marking a sharper delineation between legally binding and prescriptive provisions characterising hard law, and soft law as legally non-binding *but highly persuasive instruments*. After all, EU positive law only enshrines the distinction between legally binding acts and acts with no binding force (Article 288 TFEU) without consecrating the category of 'soft law' *per se*.[39] Nor does the CJEU use the term 'soft law' in its jurisprudence,[40] yet it clarifies in a

[35] See Stefan 2020b (n 2) 665.

[36] Ibid 667.

[37] Ibid 667. See also Mary Dobbs, 'National Governance of Public Health Responses in a Pandemic?' (2020) *European Journal of Risk Regulation 11* 240-248.

[38] Among others, Francis Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) *The Modern Law Review 56*(1)19-54; Linda Senden, *Soft Law in European Community Law* (Hart Publishing 2003); David Trubek et al., 'Soft Law', 'Hard Law', and the EU Integration: Toward a Theory of Hybridity' (2005) *Jean Monnet Working Paper 05* 1-42; Verena Fegus, 'The Growing Importance of Soft Law in the EU' (2014) *InterEU Law East 1*(1) 145-161; Oana Stefan, 'Soft Law and the Enforcement of EU Law' in Andras Jakab and Dimitry Kochenov (eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (OUP 2017) 200-217; Stefan 2020a (n 2).

[39] Stefan highlights the 'political science' pedigree of the 'soft law' concept, noting that it entered only recently (beginning of 2000s) within the realm of legal scholarship before becoming increasingly popular nowadays, Stefan 2020a (n 2) 330-331.

[40] While the CJEU sticks to the traditional distinction between EU legally binding and non-binding acts and is reluctant to accept the term 'soft law,' this concept gained some official recognition in interinstitutional agreements between the EU institutions (see Framework Agreement on Relations between

recent judgment concerning a Commission recommendation the very rationale behind EU legal acts devoid of binding force; according to the Court, 'Article 288 TFEU intended to confer on the institutions which usually adopt recommendations *a power to exhort and to persuade* (emphasis added), distinct from the power to adopt acts having binding force.'[41] By accepting that in legal terms, EU (Commission) soft law refers to non-binding instruments[42] which nevertheless could be massively followed or complied with in practice due to their exhortative or persuasive force, we propose to recalibrate the discussion on assessing and improving the quality of these instruments as persuasive tools with a view to increase their effectiveness.[43]

In previous research,[44] we looked closely into EU drafting guidelines currently available, and they rarely refer to non-binding instruments.[45] In the all too few cases when such references are made, guidelines for formulating EU soft law instruments are based on negative advice about what the draughters should not do rather than what to do to ensure clarity and preciseness in line with their non-binding nature. We expand on this work by acknowledging *that EU (Commission) soft law instruments, including those enacted under urgent and pressing circumstances, like the COVID-19 crisis, need to remain legally non-binding (in line with the EU Founding Treaties),*[46] *but be clearer and more convincing about their intended effects/results as a way to foster compliance by addressees and acceptance by the public at large.*

Our working assumption is that EU (Commission) soft law instruments should presumably be effective mainly due to the *argumentation* employed

the European Parliament and the European Commission [2010] OJ L 304/47, paras. 15, 43, Annex I and Annex IV), and lately in the Opinions of Advocate General Bobek, most remarkably in Case C 16/16P (n 7).

[41] Case C 16/16P *Belgium v Commission* (n 8) para. 26; this formula has been lately confirmed by the Court regarding the guidelines and recommendations of the European Banking Authority in Case 501/18 (n 10) para. 79 and Case 911/19 (n 10) para. 48.

[42] In the aftermath of CJEU's judgment in Case C 16/16P *Belgium v Commission* (n 8), Advocate General Bobek uses the label 'genuine soft-law measures' to designate EU non-binding instruments, see Advocate General Bobek Opinion in Case C 911/19 (n 10) paras. 40 and 52.

[43] To be sure, we are aware that compliance with EU (Commission) soft law instruments may depend also on other factors than their intrinsic argumentation and persuasiveness (e.g. the embedding of the soft law instruments within the broader EU legal-policy framework, the actual relationship between the Commission and the Member States, various political, social and economic factors, etc.); yet we argue that argumentation and persuasion are nevertheless core features of EU soft law instruments that may influence significantly their effectiveness.

[44] Coman-Kund and Andone (n 5).

[45] See European Commission. *Legislative Drafting. A Commission Manual* 1997. http://ec.europa.eu/smart-regulation/better_regulation/documents/legis_draft_comm_en.pdf; *Joint Practical Guide of the European Parliament, the Council and the Commission for Persons Involved in the Drafting of European Union Legislation* https://publications.europa.eu/en/publication-detail/-/publication/3879747d-7a3c-411b-a3a055c14e2ba732/language-en (2015) 8; European Parliament, Council of the European Union and European Commission (2011), *Interinstitutional Style Guide*, https://op.europa.eu/en/publication-detail/-/publication/e774ea2a-ef84-4bf6-be92-c9ebebf91c1b; European Commission, 'Commission Staff Working Document. Better Regulation Guidelines' SWD (2017) 350 final.

[46] See Article 288 TFEU.

to persuade addressees to comply.[47] Argumentation plays an elusive but fundamental role to ensure compliance by addressees, yet to date there is no insight into the instruments' argumentative characteristics and quality. It is imperative to re-conceptualize EU soft law instruments as argumentative instruments, and develop a normative framework providing tools for the analysis and evaluation of their argumentation. By making the instruments' argumentation a core concern, we examine its role as a means to foster compliance, which in our view is crucial for their effectiveness.

Current approaches to soft law instruments leave unresolved questions about the kind of obligations these instruments impose, why and how they are used, and how they actually work.[48] We suggest to approach these issues based on a theoretical re-evaluation of these instruments as argumentative tools. In theoretical terms, the wide range of phenomena that play a role in EU (Commission) soft law instruments requires the development of a new

[47] One may wonder whether the argumentative/persuasive dimension of EU(Commission) soft law instruments could find its legal anchoring under the duty to state reasons laid down in Article 296 TFEU; while the duty to state reasons is routinely discussed and invoked with regard to EU legal binding acts simply because, unlike non-binding acts, they are amenable to judicial review under the annulment procedure, Article 296 TFEU mentions nevertheless 'legal acts' generally, which in light of Article 288 TFEU (situated in Part Six, Chapter 2, Section 1 'The legal acts of the Union' of the TFEU) encompass both legally binding acts and acts with no binding force. According to Hofmann, Article 296 (2) TFEU includes a general obligation 'to support all acts in the EU with reasons,' Herwig C. H. Hofmann, 'General principles of EU law and EU administrative law' in Catherine Barnards and Steve Peers (eds), *European Union Law* (2nd edition, OUP 2017) 218. In jurisprudence, starting with the seminal *Grimaldi* judgment (n 10, par. 15), the CJEU routinely refers to recitals in the preambles or statements of reasons of recommendations and other EU soft law instruments for the purpose of establishing their true legal nature and effects; Advocate General Bobek even included Article 296 TFEU in the legal framework relevant for assessing Commission recommendations, followed by a detailed analysis of the preamble of the contested recommendation, see Opinion of Advocate General Bobek in Case C 16/16P (n 7) paras. 9-16. This suggests that the general duty to state reasons enshrined in Article 296 TFEU could cover also EU non-binding soft law acts (at least the recommendations and opinions covered by Article 288 TFEU), though it is not clear what the consequences of breaching such an obligation would be in this context. While a breach of the duty to state reasons in genuine non-binding soft law acts is not likely to lead to judicial review under the annulment procedure – see Case C 16/16P (n 8) para. 28 junto Case T-721/14 *Belgium v Commission* EU:T:2015:829 para. 64 - it could arguably be part of the judicial review of the validity of such an act exercised by the CJEU under the preliminary ruling procedure – see Case C-501/18 (n 10) and Case C-911/19 (n 10); additionally, after establishing that an allegedly soft law measure turns out to be a legally binding act, the Court is willing to review the legality of the measure and annul the act for infringing the duty to state reasons (for instance by not indicating the legal basis from the which the act derives its legal force – see Case C-325/91 (n 10) paras. 26 and 30). As to the scope and content of the 'duty to state reasons,' the CJEU consistently held that '[t]he statement of reasons (…) must show clearly and unequivocally the reasoning of the institution which enacted the measure, so as to inform the persons concerned of the justification for the measure adopted and to enable the Court to exercise its powers of review' – see Case C-342/03, Spain v Council ECLI:EU:C:2005:151, para. 54; in light of the important persuasive function of EU soft law, we suggest that, both normatively and practically, the emphasis of the 'duty to state reasons' should lie on the validity, soundness and completeness of the reasoning used in such instruments, as this is an essential quality for their effectiveness as non-binding instruments.

[48] A recent comprehensive study examining the impact of EU soft law on EU Member States in various policy areas has been undertaken by the European Network of Soft Law Research (SoLaR) and published in the volume Mariolina Eliantonio, Emilia Korkea-Aho and Oana Stefan (eds.), *EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence* (Hart Publishing 2021).

combination of legal and argumentative insights to grasp their complex role and functions within the Union's legal and governance framework. In more concrete terms, a close examination of the argumentation in EU (Commission) soft law instruments can deliver novel insights into how they actually (could) work, their potential persuasive value and intrinsic quality. Based on this, one may ultimately propose specific guidelines for improving the quality and effectiveness of soft law instruments as EU governance tools.

4. Argumentative patterns in EU (Commission) soft law instruments

To understand better the 'hardening' problem of EU (Commission) soft law instruments, it is most pertinent to examine them more closely. A look at the normative content of Commission's recommendations as a case in point,[49] reveals an argumentative pattern in which characteristically a standpoint is advanced requesting Member States to take certain measures listed in the enacting part of the instrument. Arguments are given in their preamble justifying that the proposed measures are envisaged as the right way to solve an existing or potential problem, while also underlining the advantages of taking those measures. In turn, cumulative arguments explain why the proposed measures will solve an existing problem. It is furthermore mentioned that the proposed measures are based on fundamental values which Member States have embraced. Additionally, arguments point at the advantage of removing the variations in the way in which the Member States deal with a certain matter. Usually, the legal basis is mentioned,[50] alongside the fact that the principles of subsidiarity (and sometimes proportionality) have been taken into account. Oftentimes, the measures addressed to the Member States are drafted in quite prescriptive and detailed terms and, furthermore, compliance/reporting mechanisms are included.[51]

The outlined argumentative pattern and structure of recommendations is hardly different from the argumentative pattern prototypical of the preamble of directives. In the case of directives,[52] the legislator uses

[49] See Corina Andone and Sara Greco, 'Evading the Burden of Proof in European Union Soft Law Instruments: the Case of Commission Recommendations' (2018) *International Journal for the Semiotics of Law 31*(1) 79-99.

[50] According to Article 292 TFEU, the Council, as a rule, adopts recommendations, the Commission being enabled to do so 'in the specific cases provided by the Treaties;' this entails in principle that Commission recommendations should not only rely on Article 292 TFEU as the sole legal basis to adopt recommendations, but also indicate the specific provisions in the Treaties empowering the Commission to adopt such instruments, which in practice is not always the case – see for instance Commission Recommendation (EU) 2020/518 (n 12).

[51] Ibid.

[52] Corina Andone and Florin Coman-Kund, 'Argumentative Patterns in the European Union's Directives: An Effective Tool to Foster Compliance by the Member States?' (2017) *Journal of Argumentation in Context 6*(1) 76-96.

the same combination of a prescriptive standpoint supported by arguments pointing at the desirable consequences of their proposed course of action. This stark resemblance provides additional support for the idea that soft law instruments, in particular recommendations, resemble hard law instruments such as directives.[53] Even if obligations are expressed 'softly,'[54] as long as an obligation is expressed in a prescriptive fashion, and due to the combination with other 'hardening' factors, such as precise implementation deadlines and reporting and 'comply or explain' mechanisms,[55] addressees are likely to interpret them in practice as quasi-legally binding.[56] In order to live up to their own explicit guidelines that non-binding acts should not resemble (in their language, structure and presentation) too closely a binding act,[57] the EU (Commission) drafting manuals need to move away from purely stylistic concerns[58] to more concrete substantive issues by recognising the fundamental role of sound and persuasive argumentation in soft law instruments. More attention should be paid to transforming the instruments from prescriptive tools resembling hard law into effective persuasive tools more in line with their legal nature as instruments with 'no binding force.'[59]

This move is deemed crucial for fully exploiting the exhortative potential and for enhancing the degree of acceptance/compliance with legally non-

[53]While this paper focusses on Commission recommendations because they fit squarely within the taxonomy enshrined in Article 288 TFEU, it should be noted that the Commission is largely using soft law instruments labeled differently (e.g. communications, guidelines, notices) that do not necessary follow the same argumentation format; one may wonder how these more informal instruments used by the Commission in practice fit with the categories of EU acts with non-binding force (i.e. recommendations and opinions) enshrined in Article 288 TFEU; in this regard, Advocate General Bobek marks a distinction between 'typical acts' (listed in Article 288 TFEU) and 'atypical acts' (not listed under Article 288 TFEU) adopted by EU institutions and bodies; whereas 'typical' acts are in principle conducive as to the their (legally binding/non-binding) legal nature until proven to the contrary (e.g. a formal recommendation under Article 288 TFEU turns out to produce binding legal effects by virtue of its content), the 'atypical' acts not explicitly enshrined in the Treaties, though largely accepted in CJEU's jurisprudence, are always assessed by the Court with a view to determine their legal nature, in particular whether they are intended to produce legal effects, see Opinion of Advocate General Bobek in Case C 16/16P (n 7) paras. 55-62.

[54]Coman-Kund and Andone (n 5).

[55]'Comply or explain' mechanisms might also be prescribed by the regulatory binding framework enabling the adoption of soft law instruments.

[56]A good example of a highly prescriptive, detailed and virtually binding EU soft law instruments during the COVID-19 pandemic is Commission Recommendation of 22.12.2020 on a coordinated approach to travel and transport in response to the SARS-COV-2 variant observed in the United Kingdom C(2020) 9607 final (see paras. 2, 4, 5 from the Preamble, and 1, 2, 6, 11, 14 in the enacting part).

[57]Guideline 2.3.3. of the Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union Legislation (2015).

[58]E.g. the use of modals such as *should*, *shall*, etc.

[59]Examples of Commission instruments in which argumentation is given a more prominent role include: Commission Recommendation of 17.09.2020 on EU health preparedness: Recommendations for a common EU testing approach for COVID-19; Commission Recommendation of 28.10.2020 on COVID-19 testing strategies, including the use of rapid antigen tests C(2020) 7502 final; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Short-term EU health preparedness for COVID-19 outbreaks COM(2020) 318 final.

binding instruments. Instead of including justificatory reasons only in the preamble of EU soft law instruments, similarly to hard law instruments such as directives, sound and persuasive arguments need to be advanced throughout the instrument, pointing at the legality, necessity, desirability and usefulness of the instrument and of the proposed measures/course of action. In other words, an '*argue and convince*' approach is to be preferred to the legal and practical ambiguity created by 'hardened' EU (Commission) soft law instruments.[60] This is key to solving the tension between the hardened content and formulations (giving the impression of legally binding instruments) of soft law acts and the voluntary compliance with such instruments (resulting from their non-binding nature enshrined in Article 288 TFEU).

5. What argumentation theory has to offer

In our view, argumentation should be an instrument of *rational persuasion*[61] in EU (Commission) soft law instruments. We maintain that argumentation theory – as a body of knowledge devoted to the study of justificatory reasoning in support of standpoints[62] – can enrich the study of these instruments and enhance their intrinsic quality by contributing to the elaboration of guidelines for improving the instruments' drafting and ultimately their effectiveness.

The significance of argumentation in EU soft law instruments has been subtly acknowledged by scholars[63] and practitioners alike.[64] In particular, argumentation is considered to serve political steering in which persuasion plays a key role. In this way, these instruments may generate important legal and practical effects, for instance when their argumentation is acknowledged by national legislative and executive authorities, or by the CJEU in its

[60]To give an example illustrating this ambiguity in practice, in the Report concerning the assessment of the implementation of the European Commission Recommendation of 3.10.2008 on active inclusion, it is pointed out that there is little compliance with the recommendation at issue 'due to lack of ideological belief' in the proposed measures' (see Hugh Frazer and Eric Marlier, 'Assessment of the implementation of the European Commission Recommendation on active inclusion: A study of national policies. Synthesis Report' (2013) Directorate-General for Employment, Social Affairs and Inclusion 12). In explaining such non-beliefs, the Report merely mentions that Member States do not want to implement certain strategies in the policy area concerned, without paying any attention to possible alternative explanations such as Member States refusing to implement the recommendation specifically because of its non-binding nature, and possible also because of the low persuasive force of the Commission recommendation.

[61]See Anthony Blair, 'Argumentation as Rational Persuasion' (2012) *Argumentation 26*(1) 71–81 73.

[62]Frans H. van Eemeren et. al, *Handbook of Argumentation Theory* (Dordrecht: Springer 2014).

[63]Adrienne Héritier, 'New modes of governance in Europe. Policy making without legislating?' (2002) *IHS Political Science Series 81* 1-24; Jürgen Neyer, 'Explaining the unexpected: efficiency and effectiveness in European decision-making' (2004) *Journal of European Public Policy 11*(1) 19-38; Anna di Robilant, 'Genealogies of soft law' (2006) *The American Journal of Comparative Law 54*(3) 499-554.

[64]See Coman-Kund and Andone (n 5), drawing on interviews with officials from the Legal Service and the General Secretariat of the European Commission.

judgments, as well as by national courts as part of their 'taking into consideration' duty.[65]

The prominent role of argumentation is not surprising, as it is an instrument of communication that can be used to influence the beliefs behind a particular attitude.[66] Argumentation supports or refutes the beliefs that lead an addressee to think or act in a certain way. Moreover, it works as *rational* persuasion, as it influences beliefs by giving reasons for supporting certain standpoints.[67] Understanding this link between argumentation and persuasion can help shed light on the important role that arguments can play in EU soft law instruments.

There are at least two functions for argumentation in this context. First, argumentation can legitimize the EU decision-maker's points of view and actions, primarily vis-à-vis addressees of the instrument. Second, argumentation may serve Member States to explain why they reject the EU decision-maker's proposals.[68] In this paper we focus on the first function, namely on the ability of argumentation to improve the intrinsic persuasive quality of EU (Commission) soft law instruments with a view to foster compliance by addressees and increase their effectiveness.

As a means of rational persuasion, argumentation can be used by the EU decision-maker to convince the addressee regarding the legitimacy and validity of its decisions and, as a consequence, may influence the formation of beliefs that can act as motivators for action by the addressee. Argumentation can legitimize the EU decision-maker's perspective through the presentation of *persuasive* justificatory reasons. The fact that addressees get to know and understand the reasons behind the recommendations/opinions/communications of the EU institutions can be particularly helpful in cases concerning crisis issues that are difficult for the addressee to accept. A proper explanation of the supporting reasons for decisions, the more so as those decisions

[65]Starting with the landmark Grimaldi judgment (n 10).

[66]See Daniel O'Keefe, 'Conviction, Persuasion, and Argumentation: Untangling the Ends and Means of Influence (2012) *Argumentation 26*(1) 19–32 24-25.

[67]O'Keefe (n 66 25); Blair (n 61 73).

[68]That is because argumentation is not coercive, but it attempts to engage with the addressee and impact their knowledge that serves as the foundation for the ultimate decision by the addressee to comply or not with EU (Commission) soft law instruments. When EU Commissions proposals for a course of action in a certain direction are supported by means of sufficient valid and sound arguments, Member States can presumably make better sense of these proposals and as a result, they are more likely to follow them, while remaining autonomous to make choices depending on their preferences. Argumentation serves as the basis for both parties to reflect on the acceptability of the proposals in EU (Commission) soft law instruments, facilitate agreement and otherwise explain disagreement. In this context, argumentation is not only an essential intrinsic feature of the soft law instrument itself, but it also plays an important role during the implementation phase, as part of the dialogue between the author of the act and its addressees, for instance, in the framework of reporting and 'comply or explain' mechanisms; this latter aspect can also be seen as a factor stimulating learning and corrective action within broader EU experimentalist governance and accountability processes – see Charles F. Sabel and Jonathan Zeitlin, 'Learning from difference: the new architecture of experimentalist governance in the EU' (2008) *European Law Journal 14* 271–327, and Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework,' *European Law Journal* (2007) *13* 447-468.

are formally non-binding, is a way to enable the addressee's evaluation of their appropriateness in light of their envisaged benefits.

6. Four argumentative parameters for better EU (Commission) soft law instruments

There are four argumentative parameters that require extensive attention for a better drafting and assessment of EU (Commission) soft law instruments: *content*, *design*, *effectiveness* and *soundness*. These parameters are based on the well-known pragma-dialectical theoretical perspective according to which argumentation is a communicative act that is advanced in order to convince an addressee of the acceptability of one's position.[69] The four parameters are derived from the perspective according to which the propositional content of standpoints and arguments (content) is presented (design) in such a way as to convince (effectiveness) the addressees through their reasonableness (soundness).[70] These four aspects go together in practice, yet we distinguish them analytically for a more precise characterisation of their role in EU (Commission) soft law instruments.[71]

6.1. Content

First, particular attention needs to be paid to the argumentative ***content*** of the EU (Commission) soft law instruments. The term 'argumentative content' concerns the so-called 'argumentative moves' and the way in which they are structured in an argumentative pattern[72] in order to justify the position advanced by the enactor of the instruments. To avoid the situation in which the EU (Commission) soft law instruments' argumentative pattern is structurally and substantively identical to that of hard law instruments, argumentation needs to take a central role not only in the preamble of the act – a situation identical to hard law instruments – but also throughout

[69] See Frans H. van Eemeren, *Strategic Maneuvering in Argumentative Discourse. Extending the Pragma-dialectical theory of Argumentation* (John Benjamins, 2010); Frans H. van Eemeren, *Reasonableness and Effectiveness in Argumentative Discourse. Fifty Contributions to the Development of Pragma-dialectics* (Springer 2015).

[70] According to the pragma-dialectical approach, arguers are viewed as advancing argumentative moves (such as standpoints and arguments) which contain one or more constellations of propositions (content) that are presented in a specific way (designed) in a quest to obtain acceptance from the addressee (effectiveness) while acting reasonably (soundness). See van Eemeren 2010 (n 69) 39.

[71] We are aware that (some of) these parameters might be considered rhetorical rather than argumentative, particularly because they concern the presentation and effectiveness of argumentation (see Cristopher Tindale, *Rhetorical Argumentation: Principles of Theory and Practice* (Sage 2004). We follow the more comprehensive pragma-dialectical view according to which dialectical and rhetorical aspects are closely intertwined (see van Eemeren 2010 (n 69) Chapters 2 and 3) and the *content* of the argumentation (dialectical aspect) is always *designed* (rhetorical aspect) to obtain *effectiveness* (rhetorical aspect), and should be persuasive due its *soundness* (dialectical aspect). See also van Eemeren 2010 (n 69) Chapters 4 and 7.

[72] See Frans H. van Eemeren, 'Identifying argumentative patterns: A vital step in the development of pragma-dialectics' (2016) *Argumentation 30*(1) 13.

the instrument.[73] In our view, more room needs to be given to argumentation in the content of soft law instruments, in particular recommendations, thus replacing many of the prescriptive rules which currently take a dominant position.

Content-wise, arguments should be employed throughout the act and be reflective of the specific situation/policy area at hand in a way that the EU (Commission) soft law instruments can be distinguished in their argumentative pattern from legally binding instruments.

In the case of a risk situation, for instance, arguments should convince the addressee to act by reflecting the specificities of the situation. Such arguments need to refer to the *urgency* of the situation, the fact that a *threat* situation is at issue, as well as a situation of *risk*, including references to issues of risk assessment,[74] risk management,[75] and risk communication,[76] not leaving aside the existence of scientific *uncertainty*.[77] To obtain maximal compliance in such a case, arguments pertaining to all these aspects need to be weighed against each other and further reinforced by explanation of each relevant aspect throughout the instrument.

Apart from increasing the instruments' persuasive potential by giving justifications for the desired course of action, arguments could also help alleviate public distrust in the Commission and enable perceiving it as a rational and sensible decision-maker aware of current problems and difficulties. It is by careful argumentative weighing and balancing that the Commission can convince the addressees and the public at large of certain unavoidable threats which can only be prevented by coordination and common action among Member States. An argumentation constructed in this way can also convince Member States that the Commission attempts to play a constructive role among scientists, politics and civil society, rather than striving to impose a 'top-down' course of

[73] Such a pattern is present sometimes in some of Commission's atypical soft law acts, such a communications – e.g. Commission Communication on additional COVID-19 response measures COM (2020) 687 final.

[74] Risk assessment – carried out by scientists – refers to the scientific evaluation of hazards and the probability of their emergence in a given context. It concerns the evaluation of the risks associated with a particular situation, substance, product – see Stephen Breyer, *Breaking the vicious circle. Toward effective risk regulation* (Cambridge Harvard University Press 1993) 9 and Communication from the Commission of 30.04.1997, Consumer health and food safety [1997] COM (97) 183 final 7.

[75] Risk management – carried out by policymakers – refers to the assessment of all measures making it possible to achieve an appropriate level of protection, which will include the evaluation of policy alternatives resulting from scientific assessment and the desired level of protection – see Breyer (n 74) and COM (97) 183 final (n 74).

[76] Risk communication refers to the exchange of information with all parties concerned, which should be as transparent as possible – see COM (97) 183 final (n 74). According to the Commission, risk assessment, risk management and risk communication form together a risk analysis – see COM (97) 183 final (n 74) and Breyer (n 74).

[77] See Commission 'Better Regulation Guidelines' (n 45), Tool #15; Corina Andone and Alfonso Hernández, 'On arguments from ignorance in policy-making' in Steve Oswald, Marcin Lewinski, Sara Greco and Serena Villata (eds.), *The Pandemic of Argumentation* (Dordrecht: Springer 2022 101-119) discussing arguments from ignorance in the case of crisis communication during COVID-19.

action. Currently, even in cases of obviously risky measures, like those concerning data sharing,[78] the content of the argumentation leaves much to be desired particularly due to the omission of some vital aspects pertaining in particular to risks and uncertainties, which are only mentioned *in passim*, let alone explained.[79]

6.2. Design

Second, the ***design*** of the EU soft law instruments needs to match the content of these instruments. The term 'design' refers to the way in which argumentative content is presented/phrased in the instrument.[80] Since these instruments do not include legally binding obligations, it should be made clear that the enactor of the instruments only makes *persuasive suggestions* for cooperation by addressees. Previous research regarding the drafting of EU soft law instruments has brought to light that reality features numerous situations of discrepancy between the way in which the instrument is presented, its content and the context of the soft law instruments.[81] Ideally, no discrepancy should exist at this level and the instrument should be formulated in such a way that it is in line with the legal nature it formally claims to have.

If the instrument is formally non-binding, the content should be designed accordingly by using non-binding language and making recourse to persuasively supported formulations suggesting/inviting addresses to consider the course of action advanced.

The types of justificatory reasons employed in EU (Commission) soft law instruments should match the type of standpoint being defended in which a *recommendation* is made, while giving enough *leeway* to the Member States to take an informed decision whether to follow the Commission's position or not. This situation needs to be distinguishable from the case of hard law instruments in which the standpoint imposes, rather than recommends, a course of action on the addressees, as in the case of directives. In this way, potential misapprehension and resistance on the part of many Member States[82] could be alleviated from the start.

In drafting well-designed EU (Commission) soft law instruments, attention has to move beyond the obvious expression of obligations, and more specifically the use of modals such as *shall/will/should*, expressing imperative,

[78] See Commission Recommendation (EU) 2020/518 (n 12).
[79] See Communication from the Commission to the European Parliament, the European Council and the Council on the assessment of the application of the temporary restriction on non-essential travel to the EU of 08.04.2020 COM (2020) 148 final (par. II and III) in which the risks related to increasing community transmission and risks related to the capacity of the health and social care systems are named without any further explanation or argumentation about their potential effects.
[80] See van Eemeren 2010 (n 69) Chapter 6 for a detailed discussion of presentational devices.
[81] See Coman-Kund and Andone (n 5).
[82] Sabine Saurugger and Fabien Terpan, 'Studying Resistance to EU Norms in Foreign and Security Policy' (2015) *European Foreign Affairs Review 20*(1/2) 3.

conditional and/or exhortative moods, to distinguish between binding/non-binding language. By paying attention to such expressions of modality,[83] it is possible to determine only to some extent the force with which standpoints and arguments are advanced (soft or hard obligations),[84] and the degree of commitment expected from addressees (through mechanisms of soft or hard enforcement).[85] These aspects permit drawing to some degree conclusions as to the nature of the provisions in EU soft law instruments, the intentions of the enactor of the act to impose/not impose certain obligations, and the legally-binding/non-binding effects they produce. Yet this type of analysis in strictly modal terms, which the existing drafting manuals and the CJEU traditionally favour,[86] provides only a partial picture of the strength of the obligations in EU soft law instruments.

More attention needs to be paid also to other means of imposing commitments on addressees, such as formulations referring to '*coordinating* and where necessary *pooling efforts* at European level,' '*strengthened coordination* at EU level,' 'fragmentation of effort in tackling cross-border health threats makes all Member States *collectively* more vulnerable'(our italics).[87] These formulations may suggest a form of pressure on the Member States to act in a desired direction, and also that the act could be interpreted as having legally binding effects, not just practical effects, thus contributing to the legal ambiguity of the soft law instrument. The instruments need to be designed in such a way that there is full consistency between the conspicuous non-binding recommending nature of the instrument and the way in which its content is designed, i.e. leaving aside expressions of hard obligations.

[83]Richard Foley, 'Legislative language in the EU: The crucible' (2002) *International Journal for the Semiotics of Law 15* 361-374; Giuditta Caliendo, 'Modality and communicative interaction in EU law' in Christopher Candlin and Maurizzio Gotti (eds.), *Intercultural Aspects of Specialized Communication* (Bern: Peter Lang 2007) 241-259; Christopher Williams, *Tradition and Change in Legal English: Verbal Constructions in Prescriptive Texts* (Peter Lang 2007); Klaudia Gibová, 'On Modality in EU Institutional-legal Documents' in Alena Kačmárová (ed.), *English Matters* (Prešov: Prešovská univerzita 2011) 6-12; Colin Robertson, 'EU Legal English: Common Law, Civil Law, or a new genre?' (2012) *European Review of Private Law 5&6* 1215–1240; Giusy Scotti di Carlo, 'Linguistic patterns of modality in UN Resolutions: The role of *shall*, *should*, and *may* in Security Council Resolutions relating to the second Gulf War' (2016) *International Journal for the Semiotics of Law 30* 223-244; Andrea Rocci, *Modality in Argumentation* (Springer 2017).

[84]Hard obligations are expressed in provisions including 'must,' 'shall,' 'are to [undertake']. Soft obligations are expressed by 'should' (see Lavanya Rajamani, 'The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations' (2016) *Journal of Environmental Law 28*(2) 344-351).

[85]According to Terpan, soft enforcement, such as monitoring, is aimed at ensuring compliance without necessarily resorting to coercion or constraint, whereas hard enforcement concerns those situations in which judicial control or constraining non-judicial control is available, Terpan (n 6) 73-74.

[86]See Christopher Williams, 'Fuzziness in legal English: What shall we do with *shall*?' in Anne Wagner and Sophie Cacciaguidi-Fahy (eds.), *Legal Language and the Search for Clarity: Practice and Tools* (Peter Lang 2006) 237-264; Anne Wagner and Jan Broekman (eds.), *Prospects of Legal Semiotics* (Springer 2010); Zsolt Ződi, 'The limits of plain legal language: understanding the comprehensible style in law' (2019) *International Journal of Law in Context 15* 246-262.

[87]See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Building a European Health Union: Reinforcing the EU's resilience for cross-border health threats, COM(2020) 724 final 2.

Additionally, the instruments' design should avoid mentioning enforcement/compliance mechanisms.[88] According to Bobek,[89] legal acts designed with enforcement mechanisms attached to them are perceived as legally binding acts, because enforcement is a defining element of binding force. If one looks at the current design of EU soft law instruments, despite their formal legally non-binding character, they often contain some enforcement/compliance elements that may determine Member States to take certain measures under pressure of possible restrictions.[90] As Bobek explains,[91] these are *indirect* mechanisms of enforcement, such as structural mechanisms of reporting, notification, monitoring and supervision,[92] as well as institutional elements[93] that can be viewed as inducing or nudging compliance.

6.3. Effectiveness

Third, an important parameter to consider is the ***effectiveness*** of EU soft law instruments. The term 'effectiveness' refers to the capacity of the EU soft law instruments to obtain compliance from the addressee.[94]

Argumentation should be employed to increase chances that the EU (Commission) soft law instruments are complied with in the absence of legal coercion.

While the use of argumentation is highly desirable, it needs to produce the desired legal and practical effects and result in enhanced compliance by addressees.[95] Specific argument types need to be employed

[88] In this respect, Bobek notes that the Court of Justice displays some reluctance towards accepting the inclusion of compliance or monitoring mechanisms into various Commission 'atypical' soft law instruments, see Opinion of Advocate General Bobek in Case C16/16P (n 7) para. 131.

[89] Ibid. para. 74.

[90] A telling example concerns the recommendations included in the regular Commission reports issued in the context of the Cooperation and Verification Mechanism (CVM) for Bulgaria and Romania, whereby compliance with these recommendations is taken as a basis for the Commission to assess whether the two Member States are meeting the binding benchmarks required for taking a formal decision to end the post-accession CVM. Another case in point, though in a very specific legal-political framework, are the EU country-specific recommendations addressed to Member States under the European Semester in the Economic and Monetary Union (EMU) area, see Päivi Leino-Sandberg and Fernando Losada Frage, 'How to make the European Semester more effective and legitimate? Study for the European Parliament's Committee of Economic and Monetary Affairs' PE 651.365, July 2020.

[91] Opinion of Advocate General Bobek in Case C16/16P (n 7) paras. 120-122.

[92] One example is Commission Recommendation (EU) 2020/518 (n 12), in which it is stated that 'Member States should, by 31 May 2020, *report* to the Commission on the actions taken pursuant to this Recommendation. Such reports should continue on regular basis for as long as the COVID-19 crisis persists' para.31.

[93] E.g. the institution enacting the non-binding instrument being also competent to adopt binding measures (including sanctions) on the same addressees in the same field or in related fields.

[94] See van Eemeren 2010 (n 69) Chapter 6 for a discussion on the effectiveness of argumentative moves.

[95] See Helen Xanthaki and Giulia Pennisi, 'Crossing the Borders between Legislative Drafting and Linguistics: Linguists to the Aid of Legislative Drafters' (2012) *Explorations in Language and Law 1* 83-12; see also Whelanová (n 16) as well as Case T-721/14 *Belgium v Commission* ECLI:EU:T:2015:829; Case C-528/15 *Al Chodor* ECLI:EU:C:2017:213.

strategically depending on the role and function of the instrument. A proper design of arguments should foster effectiveness of EU soft law instruments, i.e. compliance by Member States and the least degree of resistance/litigation.

Ideally, it should be possible to establish which argument types are best adapted to the preferences and values of the addressees depending on the specific goal that is aimed to be achieved by means of the EU soft law instrument and the concerned specific policy area. For instance, if the goal is to achieve coordination among Member States to contain the spread of COVID-19, argument types referring to an emergency risk regulation need to be advanced. In its Communication 2020/C 102 I/3,[96] for example, the Commission only argues that EU coordination is needed 'to maximise the potential impact of measures taken at the national level,' but leaves aside concrete references as to why the emergency risk situation needs to be approached at EU rather than national level.

Indeed, argumentation is not the only factor that can induce compliance, and the effectiveness/non-effectiveness of a soft law instrument should not be reduced to it. Legal and political factors,[97] such as the general principles of EU law (i.e. *effet utile*, the duty of loyal cooperation under Article 4(3) TEU,[98] equal treatment or the principle of legitimate expectations[99]), alongside the fear of deterioration of the relation between a Member State and the EU,[100] also play an important role in obtaining compliance. Yet, in our view, effective argumentation is an essential parameter for increasing the degree of acceptance/compliance by Member States/addressees as regards the desired course of action enshrined in EU(Commission) soft law instruments.

6.4. Soundness

Fourth, a vital parameter to be taken into account is the ***soundness*** of the argumentation. The term refers to so-called 'reasonableness' of argumentative moves, i.e. arguments that are not in any way deficient and manipulative, including but going beyond a purely logical assessment of arguments.[101] Thus, not only illogical arguments (such as inconsistencies) need to be avoided, but also any argument that may hinder obtaining compliance

[96]Communication from the Commission of 30.03.2020, Communication from the Commission COVID-19: Guidance on the implementation of the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy (2020/C 102 I/3).

[97]See Ulrike Mörth, 'Soft Law and New Modes of EU Governance – A Democratic Problem?' (2006) Online paper presented in Darmstadt November 2005: 1-25.

[98]See *Grimaldi* (n 10).

[99]See C-213/02 P *Dansk Rørindustri A/S v Commission* EU:C:2005:408 para. 211.

[100]See Alexandre Flückiger, *(Re)faire la loi : traité de légistique à l'ère du droit souple* (Stämpfli 2019) 28 and 309-310.

[101]See van Eemeren 2010 (n 69) Chapter 7.

from the addressee reasonably, for example by misleading through ambiguity, vagueness, false dichotomies, false generalisations, omission of important information, etc.

The issue of soundness concerns specifically an assessment of the quality of the argumentation employed in EU soft law instruments, which in practice amounts to judging whether certain *fallacies* have been committed by the enactor of the instruments.[102] Fallacious arguments can be and oftentimes are indeed persuasive,[103] but it is particularly important that persuasion is acquired through reasonable means in order to obtain credibility in the long term. The European Commission might not even be aware of using fallacies, but they are particularly critical, since by manipulating the addressee in adopting a certain (controversial) course of action they obstruct acceptance of the Commission's standpoints and arguments, affect the credibility of the enacting institution, and subsequently their acceptance.[104]

Argumentation should be employed reasonably to obtain compliance with the EU (Commission) soft law instruments through non-fallacious means.

Previous research demonstrates that EU recommendations fall short of sound argumentation[105] as concerns the way in which the Commission deals with its burden of proof, which is more often than not evaded. The Commission fails to support the subsidiarity test with sound argumentation, by not demonstrating why achieving a certain goal at European level is necessary because it cannot be sufficiently achieved at national level. The burden of proof is in such cases evaded, because no argument is provided why a course of action should be taken at EU level instead of maintaining the current situation at national level.

Other obvious fallacies include unclear and ambiguous formulations, the fallacy of giving the impression of agreement between addressor and addressee when that is not necessarily the case, or the common fallacy in the preamble of many soft law instruments in which the Commission acts as if the Member States and the EU, just by acknowledging the same problems, also share the idea that certain uniform measures need to be adopted.[106]

[102]See van Eemeren et. al (n 62) 24-25. A fallacy is an invalid or irrational argument that damages the reasonable persuasion process and often passes unnoticed.

[103]See Daniel O'Keefe, 'Potential Conflicts between normatively-responsible advocacy and successful social influence: Evidence from persuasion research' (2007) *Argumentation 21* 151–163.

[104]Because of their treacherous nature and recognizing the importance of good quality arguments, dialecticians and rhetoricians alike have always been concerned with fallacies, starting with Aristotle's *Topics* (ES Forster, transl.) (Cambridge: Harvard University Press 1960). Particularly worth mentioning are 'classics' such as Charles Hamblin, *Fallacies* (London: Methuen 1970); John Woods and Douglas Walton, *Fallacies* (Berlin: de Gruyter 1989); van Eemeren 2015 (n 69).

[105]See Andone and Greco (n 49).

[106]In many EU (Commission) soft law instruments, the recommended measures are presented as if, should the addressee not want to take the recommended measures, the Member States would act against their own principles and against the spirit of solidarity which is expected in times of crisis. In Commission Recommendation (EU) 2020/518 (n 12), it is mentioned that 'An exceptional crisis of such magnitude requires determined action of all Member States and EU institutions and bodies

Moreover, fallacies of omission (such as not mentioning particular risks as in Commission Recommendation 2020/518)[107] are committed particularly in crisis situations. In addition, the Commission indicates that to combat a certain problem, there is only one and, in rare cases, two options available, whereas other options are not mentioned, let alone weighed against each other.[108] Presenting and supporting only certain courses of action, while dismissing others, usually creating a false dichotomy, impacts the quality of the argumentation. A particular direction is presented as optimal by the Commission and its advantages exaggerated, while giving the impression that other options are suboptimal by downplaying their advantages or by simply not discussing them at all.[109] In argumentative terms, the Commission tries to be persuasive at all costs to the detriment of reasonableness.[110]

Another fallacious case in point is at issue when a certain 'uniformization' is suggested. Although the Commission refers explicitly to cooperation and coordination among Member States,[111] and does not lay down any rule to harmonise a certain policy (thus confirming the Member States' regulatory powers in the areas concerned), not much is left to the Member States to decide upon. As Bobek explains,[112] when so many instructions are given, not much liberty is given to the Member States, which should be in principle free to set objectives of their policies and define the level of protection for the population.[113] Even if the soft law instruments are labelled

working together in a genuine spirit of solidarity. […] Digital technologies and data have a valuable role to play in combating the COVID-19 crisis […]. It is therefore necessary to develop a common approach to the use of digital technologies and data in response to the current crisis.' (1).

[107]See Commission Recommendation (EU) 2020/518 (n 12), in which measures are proposed for a common Union toolbox for the use of technology and data to combat and exit from the COVID- 19 crisis by mentioning only the advantages of using and sharing such technologies at EU level, but no risks, problems or other impact are touched upon when presenting (in a very detailed manner) these technologies.

[108]See Commission, EU Strategy for COVID-19 vaccines (Communication) COM (2020) 245 final, in which it is mentioned under section 2.1 that only one sure solution exists: 'joint action at EU level is the surest, quickest and most efficient way of achieving that objective' (of developing and producing a sufficient number of vaccines). Additionally, in section 5 it is concluded that '[…] an effective and safe vaccine against COVID-19 is generally considered the most likely lasting solution to the ongoing pandemic.' Other options, such as the development of a safe medicine, are completely left aside.

[109]This is basically the case in all EU (Commission) soft law instruments, as all of them underline the need for harmonization and common rules and measures by mentioning that action by individual Member States is never sufficient, efficient, feasible, safe, etc. Such is the case, for example, in Commission Recommendation (EU) 2020/518 (n 12 1): 'No single Member State can succeed alone in combating the COVID-19 crisis.' It is recognized that Member States have taken appropriate actions, but the advantages of those actions are not discussed at all. Instead of referring to the advantages of the measures already existent at Member State level, the Commission points out (n 11 10) that 'certain Member States have taken measures to simplify access to necessary data. However, the EU's common efforts combating the virus are hampered by the current fragmentation of approaches.'

[110]van Eemeren 2010 (n 69) 187-212.

[111]The Commission refers generally to 'a joint European approach,' coordination with the Commission' and 'EU coordination.'

[112]Opinion of Advocate General Bobek (n 7) para 89.

[113]See for an example Commission, COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement (Communication) C(2020) 2516 final [2020] OJ C 126/12 (very detailed document of 27 pages).

'recommendations,' 'communications,' 'opinions,' they set strict and highly detailed rules for behaviour restraining the discretion of the Member States to the point of obfuscating their true legal nature. On the contrary, they may arguably be interpreted as legally binding and create legitimate expectations which are analogous to legally binding acts, and thus limit the addressee's exercise of discretion in the future.[114] If the act indicates precise and detailed actions laid down in a prescriptive fashion, it is more likely to induce *de facto* 'harmonisation,' by creating the misleading impression that addressees must/need to comply with the instrument.[115] What is particularly needed for a proper evaluation of argument soundness is to develop criteria for reasonable argumentation and unravel fallacious argumentation in EU (Commission) soft law instruments, without however ignoring paradoxical cases in which unsound arguments are nevertheless effective in practice.

ARGUMENTATIVE PARAMETERS FOR DRAFTING PERSUASIVE EU (COMMISSION) SOFT LAW INSTRUMENTS

PARAMETER	SPECIFIC CRITERIA/REQUIREMENTS
Content	• The arguments should reflect the specificities of the situation and the policy area • The argumentative patterns should be distinguishable from their counterparts in legally binding instruments • Arguments should be provided in support of the legal basis as well as the of necessity and desirability for enacting the instrument • Argumentation should as much as possible integrate/rely on relevant evidence/ information • Arguments should be employed throughout the instrument
Design	• The instrument should be designed as to reflect consistency between its legally non-binding nature and its verbal presentation • The instrument should contain non-binding formulations merely persuading/ inviting addressees to adopt the proposed measures
Effectiveness	• Argumentation should be employed to increase chances that the instruments are complied with in the absence of legal coercion • Argument types should be adapted to the preferences and values of the addressees depending on the specific goal that is aimed to be achieved by means of the instrument and the relevant policy area
Soundness	• Argumentation should be encompassing and complete by enabling the addressees to judge whether to accept or not accept the proposed measures • Arguments should be reasonable, logically valid and accurately reflecting the objectives and legal nature of the instrument, as well as the legal-institutional-policy context within which the instrument is enacted • Fallacious arguments should be avoided

[114]See Opinion of Advocate General Bobek (n 7), para 89.
[115]Ibid.

7. Conclusion

There is a non-negligible trend in the EU decision-making landscape which is marked by a proliferation of soft law instruments, further exacerbated during times of crisis like the COVID-19 crisis. These are norms generating erratic legal and practical effects, and arguably are often intended to play a similar role as a legally binding act, even if they are formally deprived of binding force. Yet beyond the specific context of the COVID-19 crisis, it has to be tested whether the current EU (Commission) soft law instruments are a credible long-term arrangement; in particular it has to be seen 'whether, in the speed of production, rule of law checks and balances are respected, and what effectiveness these measures will have.'[116]

De jure EU (Commission) soft law instruments are non-binding, but *de facto* they arguably often look and act like a quasi-binding act. While the urgency characterising crisis situations like COVID-19 could represent to some extent a mitigating factor, the Commission seems nevertheless to take a short-sighted strategy by proposing fast, but problematic 'hardened' soft law instruments that could lead to more contestation and credibility loss. Policy credibility 'depends on effective implementation.'[117] If EU (Commission) soft law instruments are controversial or contested and as a result, they are not implemented or complied with, credibility is lost.

In the report concerning the assessment of the implementation of the European Commission Recommendation on active inclusion,[118] experts recommend more monitoring by and reporting to the Commission to ensure compliance by addressees, but nothing to the Commission itself to improve its own instruments; they point at more political action and more recommendations, leaving aside the argument of the Member States that they might have enough measures in place at national level[119] or that low compliance might be also caused by the low quality of Commission's soft law instruments. In our view this *ad hoc* approach is not tenable in the long run.

We suggest that the way forward is to simply admit that the EU (Commission's) soft law instruments should not amount to more than that they are from a formal legal point of view – i.e. non-binding instruments, at least from the perspective of the addressees.[120] This would permit advancing

[116]Stefan 2020b (n 2) 665.
[117]Giandomenico Majone, 'The Credibility Crisis of Community Regulation' (2000) *Journal of Common Market Studies 38* 279.
[118]See supra, Section 4 of this paper (n 60).
[119]Frazer and Marlier (n 60) section 6.
[120]One special situation concerns the cases when the Commission limits its own discretion via a soft law instrument and the addressees found their behavior on that instrument; in this context, the principle of good faith, legitimate expectations and legal certainty require that the Commission (not the addressees) is bound by its own instrument (and potentially also liable for damages) vis-à-vis the addressees who acted in good faith on the basis of that instrument – see C-213/02 P (n 99).

the debate on soft law by focussing on the intrinsic quality of these instruments as argumentative tools persuading addressees to follow the proposed course of action and on how to improve them.

In this respect, we propose to approach EU (Commission) soft law instruments from an argumentation theory perspective focussing on the content, design, effectiveness and soundness (to be further operationalised through more concrete criteria), as core normative parameters for assessing and enhancing the persuasive force and, thereby, the quality of these governance tools. At the same time, this approach would alleviate some of the legal and legitimacy problems – and the Sisyphean task to solve them – resulting from the perceived legal ambiguity of EU (Commission) soft law. In our view, the four argumentative parameters advanced could significantly contribute to improving the drafting of these instruments in the context of better law-making initiatives, as well as ensure better observance of the principles of legality, sincere cooperation, and taking well-reasoned decisions, thereby enhancing legal certainty, legitimacy and effectiveness of EU action. Ultimately, *the effectiveness of EU (Commission) soft law instruments should not depend so much on their 'hardened' ambiguous status, but on their capacity to act as argumentative tools persuading addressees to adopt the desired course of action.*

Disclosure statement

No potential conflict of interest was reported by the author(s).